Supreme Court, U.S.
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No. 01-873

In the

Supreme Court of the United States

EDWIN R. BOWEN, WARDEN,

Petitioner,

v.

KEVIN RICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT'S RECENT DECISION IN *BROOKS v. WALLS* LENDS FURTHER SUPPORT TO PETITIONER'S VIEW THAT *CERTIORARI* IS WARRANTED IN THE CASE AT BAR.

In light of a recent case decided by the United States Court of Appeals for the Seventh Circuit, Petitioner Edwin Bowen (Bowen) submits this Supplemental Brief in Support of his Petition for Writ of *Certiorari* pursuant to United States Supreme Court Rule 15(8). As this Court will recall, Bowen, in his petition for writ of *certiorari* filed in this Court on October 30, 2001, argued that the Seventh Circuit's decision in *Rice v. Bowen*, 264 F.3d 698 (7th Cir. 2001), conflicted with this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), and, in particular, rendered an unreasonable interpretation of that case's footnote concerning the effect of state statutory exceptions to untimely state post-conviction petitions, and that *certiorari* was necessary to correct and instruct the Seventh Circuit with respect to the tolling utility of such exceptions. Bowen also argued that the *Rice* panel ignored this Court's decision in *Harris v. Reed*, 489 U.S. 255 (1989), concerning the effect of alternative holdings in the realm of procedural default, and that the decision strayed from the *Harris* caveat that procedural dispositions made by state courts should not be ignored, notwithstanding a contemporaneous holding on the merits of the claim.

The Seventh Circuit's recent decision in *Brooks v. Cowan*, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7th Cir. 2002) (attached as Appendix A), strengthens the grounds upon which Bowen seeks *certiorari*. *Brooks* reveals that the Seventh Circuit's recent habeas time-bar jurisprudence is beset by such intra-circuit inconsistency that it is impossible to gauge the efficacy, in that circuit, of the AEDPA's statute of limitations in general, and of the "properly filed" tolling exception in particular. In *Brooks*, the Seventh Cir-

cuit recognized that *Rice* ignored *Harris* and made dubious use of this Court's footnote 2 in *Artuz*, where, as noted above, this Court reserved judgment on the tolling capabilities of post-conviction statutes which contain allowances for late filing. The *Brooks* court also observed that *Rice* cannot be reconciled with a pair of Seventh Circuit decisions (cited by Bowen in his petition for writ of *certiorari*) which held that, when the state court offers holdings on both the substantive merits of the claim and on the timeliness of the post-conviction petition, *Harris* should guide the federal court's treatment of such dual holdings, and the effective result being that a state court's finding of untimeliness must be respected and, accordingly, must control the federal court's determination of whether the collateral petition was "properly filed" so as to toll the AEDPA. *See Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000); *Jefferson v. Welborn*, 222 F.3d 286 (7th Cir. 2000).

The *Brooks* court expressed frustration that *Rice* is still the law of the Circuit, but did not overrule *Rice* notwithstanding (1) *Rice's* failure to acknowledge *Harris* and its attendant conflict with *Jefferson* and *Fernandez*, and (2) the implication inherent in the *Rice* decision, by virtue of Rice's interpretation of the *Artuz* footnote, that "almost every collateral attack in Illinois [will be] 'properly filed' for purposes of §2244(d)(2). . ." *Brooks*, slip opinion at 2. Even more frustrating, according to the *Brooks* court, for purposes of establishing a regular, settled pattern of time-bar jurisprudence in the Seventh Circuit, was the failure of the *Rice* panel to circulate the opinion in accordance with local rules in order to overrule *Fernandez* and *Jefferson* and their application of the *Harris* doctrine to state court decisions that implicate both a review of the merits and a finding of untimeliness.

After *Brooks*, it is evident that the Seventh Circuit is split on the utility of the Illinois Post-Conviction Hearing Act's

"lack of culpable negligence" exception, with the *Brooks* panel disavowing the view that an untimely state collateral petition, simply by virtue of that exception, tolls the AEDPA, and with the *Rice* panel holding that the Illinois exception to untimely state collateral attacks necessarily requires that the state courts review the merits, which, in turn, confers "properly filed" status on an otherwise untimely state petition. Also evident is the split regarding the role of *Harris* in such matters, with *Brooks* reaffirming its belief that the application of that decision within the AEDPA's "properly filed" context is appropriate, and with *Rice*, as *Brooks* pointed out, all but ignoring it.

At the end of the Seventh Circuit's meandering path is a labyrinth of caselaw which offers no guidance to habeas litigants, to the state, or to the lower courts. It is vital that *certiorari* be granted to resolve these questions, not just for the sake of the Seventh Circuit, but for the benefit of the other federal courts as well.

CONCLUSION

For the aforementioned reasons, as well as for those reasons already set forth in his petition for writ of *certiorari*, Petitioner, Edwin Bowen, respectfully requests that, in light of the Seventh Circuit's inconsistent time-bar jurisprudence as evidenced by its recent decision in *Brooks v. Walls*, this Court grant *certiorari* either by plenary consideration or summary reversal.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1584

LYNN BROOKS,

Petitioner-Appellant,

v.

JONATHAN R. WALLS, Warden,
Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 00-4049—**Joe Billy McDade**, *Chief Judge*.

ARGUED NOVEMBER 29, 2001—DECIDED FEBRUARY 1, 2002

Before COFFEY, EASTERBROOK, and RIPPLE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Our appeal presents a single but important question: whether the one-year period for filing federal collateral attacks on state criminal judgments, see 28 U.S.C. §2244(d), has any effect on prisoners of Illinois. Section 2244(d)(2) excludes from this year any time during which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending". See *Artuz v. Bennett*, 531 U.S. 4 (2000). A collateral attack that is untimely under state law is not "properly filed." See *Freeman*

v. Page, 208 F.3d 572 (7th Cir. 2000). But if the state decides not to enforce its timeliness rules, and considers on the merits a petition that could have been dismissed as untimely, then we treat that petition as "properly filed" for purposes of §2244(d)(2). See *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000); *Jefferson v. Welborn*, 222 F.3d 286 (7th Cir. 2000). The complication is that Illinois permits, and may require, trial judges to cast at least a sidelong glance at the merits in order to determine whether to excuse failure to meet the deadline. See 725 ILCS 5/122-1; *People v. Wright*, 189 Ill. 2d 1, 723 N.E.2d 230 (1999); *People v. Coleman*, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998). Thus any state prisoner whose delay was not caused by his own "culpable negligence" (which forecloses any consideration of an untimely filing) receives either plenary review or a judicial response along the lines of "this petition is late; and because it does not demonstrate a miscarriage of justice, I have decided not to excuse the untimeliness."

Lynn Brooks filed an untimely collateral attack and received a reply of this kind. The state's appellate court affirmed, holding expressly that Brooks' filing was untimely. Nonetheless, Brooks contends that any consideration of the merits, no matter how abbreviated, in order to determine whether to enforce the timeliness requirement, amounts to a decision *on* the merits, which means that the state judiciary considered the petition to be "properly filed" even if the state courts say that the filing was untimely or procedurally irregular in some other way. If this is so, then almost every collateral attack in Illinois is "properly filed" for purposes of §2244(d)(2), and the tolling rules in §2244(d) allow federal collateral attacks to be commenced long after the statutory year has expired. The district court held that Illinois' willingness to accept untimely filings in *some* cases does not imply that *every* filing is timely, and it dismissed Brooks' federal petition as untimely—which Brooks concedes it is, unless the time devoted to his untimely state pe-

tition is excluded by §2244(d)(2). A judge of this court issued a certificate of appealability mentioning only the statutory timeliness issue. This certificate does not satisfy 28 U.S.C. §2253(c)(2). But Brooks contends that his underlying theories of relief include at least one substantial constitutional claim, and as the state did not ask us before briefing to vacate the certificate we are entitled to address the antecedent statutory question. See *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000); *Ramunno v. United States*, 264 F.3d 723 (7th Cir. 2001).

Brooks starts from the major premise, articulated in *Freeman*, that proper filing is a matter of state law:

> Whether a collateral attack is "properly filed" can be determined in a straightforward way by looking at how the state courts treated it. If they considered the claim on the merits, it was properly filed; if they dismissed it for procedural flaws such as untimeliness, then it was not properly filed.

208 F.3d at 576. He adds the minor premise that, when deciding whether to accept an untimely filing, a state court in Illinois gives some consideration to the merits. From this consideration of the merits Brooks concludes that even an untimely petition is "properly filed" in Illinois—and even if the state court holds expressly that it was *not* timely and that the delay will not be excused.

The hidden premise of this syllogism is that when a state court decides a case on two grounds—one procedural, the other related to the merits—then the federal court ignores the procedural ground and treats the state's disposition as if it had been based wholly on the merits. Yet *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989), held otherwise for purposes of the independent-and-adequate-state-grounds doctrine. When a state ground (such as failure to make a contemporaneous objection, or to raise an issue on appeal)

supports a state court's rejection of an argument based on federal law, that federal issue cannot be raised on collateral attack unless the prisoner shows cause for, and prejudice from, that default. E.g., *Coleman v. Thompson*, 501 U.S. 722, 729-35 (1991). We explained in *Fernandez* and *Jefferson* that a decision with respect to proper filing, as a state-law procedural ground, should be treated the way *Harris* specifies for other state grounds. This means two things of particular relevance: first, that when a state court decides the merits *and* asserts a procedural bar, the federal court must respect both rulings; second, that when state courts disagree about the right ground of decision, the ruling of the last state court to articulate a reason governs. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Coleman, supra*. Thus if, for example, a state trial court accepts an untimely petition, but the court of appeals rules that the petition should not have been accepted and considered, it is the appellate ruling that controls. And when the last state court relies on dual grounds, the procedural ground means that the petition was not "properly filed."

Brooks recognizes that under the approach of *Harris* (adopted for §2244(d) cases by *Fernandez* and *Jefferson*) his state collateral attack was not "properly filed." The state's court of first instance relied on both a procedural ground (untimeliness) and the merits (to the extent the judge thought Brooks' substantive claim too weak to justify accepting an untimely petition). The state's court of appeals relied on the procedural ground exclusively. Nonetheless, Brooks contends, we implicitly overruled *Fernandez* and *Jefferson* (and departed from *Harris*) when holding in *Rice v. Bowen*, 264 F.3d 698 (7th Cir. 2001), that an untimely petition is "properly filed" for purposes of state law when the initial state court treats it as frivolous. A declaration of frivolousness is "on the merits," the panel noted in *Rice*. Our panel observed in *Rice* that "[o]ther circuits have . . . held that if a state's rule governing the timely commence-

ment of post-conviction proceedings contains exceptions requiring courts to examine the merits of the petition before dismissing it, the petition, even if ultimately held to be time-barred, should be regarded as properly filed." 264 F.3d at 701-02, citing *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001), and *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001). *Dictado*, which states its position most clearly, held that when a state court gives two grounds—one procedural and resting on state-law conditions for filing, the other related to the merits of the federal claim—the procedural ground is disregarded and the petition treated as "properly filed" for purposes of §2244(d). *Dictado* did not mention *Harris*, *Fernandez*, or *Jefferson*, nor did our panel in *Rice*.

One panel of this court cannot overrule another implicitly. Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e). *Rice* did not propose to overrule any decision, and the panel did not circulate its opinion to the full court before release. So *Fernandez* and *Jefferson* remain the law of the circuit—and they are incompatible with *Dictado*, at least if that opinion is read broadly. A narrow reading is possible. The independent-and-adequate-state-grounds doctrine, which *Fernandez* and *Jefferson* take §2244(d)(2) to instantiate, operates only if the state ground is *independent* of the federal ground. So if, for example, a state were to provide something like "all meritorious collateral attacks are timely, but no unmeritorious collateral attack is timely," then timeliness would not be independent of the federal constitutional claim. A declaration that a given petition had been filed "too late" would represent no more than the state court's decision on the merits; and a state may not use procedural window dressing to avoid later federal collateral review. Perhaps this is what actually happened in *Rice*. But we do not think that Illinois systematically attempts to disguise resolution of the merits as a disposition of timeliness.

The limit in 725 ILCS 5/122-1 is stated in terms of days, not in terms of the merits. It lacks the merits-related exceptions that the AEDPA applies to federal courts. The year for a federal prisoner to file may be restarted if, for example, the Supreme Court renders a novel and retroactive constitutional decision. See 28 U.S.C. §2255 ¶6(3); *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001). Yet it would be fanciful to say that similar exceptions, if adopted at the state level, make *all* collateral attacks "properly filed"—even those collateral attacks that are not based on novel, retroactive developments in federal law. What Illinois has done makes even less use of federal law. The state's system seems to be modeled after the doctrine, used by state and federal courts alike, that untimely filings and other non-jurisdictional blunders in criminal cases may be disregarded in order to correct plain error. Deciding whether an error is "plain" often entails at least limited review of the merits. See *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Olano*, 507 U.S. 725 (1993). And it is settled (at least in this circuit) that a plain-error exception to a procedural rule does not compromise that rule's quality as an independent ground of decision.

Ever since *Wainwright v. Sykes*, 433 U.S. 72 (1977), federal courts have held that a defendant's failure to assert his constitutional contentions at the time, and in the manner, required by state law forfeits any entitlement to federal collateral review of those contentions, unless the defendant can show cause for and prejudice from the omission, or a miscarriage of justice. Stating the rule this way builds in a sort of plain-error exception, on top of the plain-error doctrine that states apply themselves, yet the Supreme Court does not view it as demolishing the rule by eliminating the "independence" of the procedural ground. We pointed out in *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383-84 (7th Cir. 1990), that the dual-grounds rule of *Harris* is designed for these situations. A state court may say something like: "this

argument has been forfeited because not raised in the proper way (such as by an objection to the jury instructions); and the defendant has not established plain error because there was no error at all." When it does this, it has not abandoned the procedural ground but has instead added a substantive failing to the procedural one. The independent-and-adequate-state-ground doctrine is one of long lineage, founded not only in respect for state tribunals but also in recognition that litigants should be given incentives to present their contentions as soon as possible, when errors can be avoided, rather than to save them up for presentation after the error has been committed. *Sykes* is based on pragmatism as well as comity. A state does not abandon the benefits of this doctrine by allowing plain-error review—or by accepting untimely collateral attacks when the standards of plain error have been met. To the extent that *Dictado* holds that any merits-related exceptions to state timeliness rules make all state collateral attacks timely (and thus "properly filed") it is incompatible with the law established by the Supreme Court (in opinions such as *Sykes* and *Harris*) and by this circuit (in opinions such as *Prihoda*, *Fernandez*, and *Jefferson*).

The ninth circuit may well think that the broad reading of *Dictado* is the correct one, because it held in *Smith v. Stewart*, 241 F.3d 1191 (9th Cir. 2001), again without discussing *Harris*, that availability of plain-error review destroys the independence of a state's procedural ground of decision. The defendant in *Smith* failed to make a timely argument that his prior lawyer had furnished ineffective assistance of counsel, and on collateral attack the state court deemed the contention forfeited. Nonetheless, the ninth circuit held, a federal court is entitled to disregard the forfeiture and resolve the ineffective-assistance claim on the merits, because Arizona (the state in question) can consider the merits when deciding whether to enforce its forfeiture

rules. This is the same approach that the ninth circuit used in *Dictado* to determine proper filing under §2244(d)(2).

Certiorari has been granted in *Smith* and a question certified to the Supreme Court of Arizona, so that it may decide whether forfeiture and the merits are bound together as the ninth circuit believed. See *Stewart v. Smith*, No. 01-339 (U.S. Dec. 12, 2001). If the state court gives an affirmative answer, the Supreme Court will need to decide whether the availability of a plain-error exception to a state procedural rule means that federal courts may ignore a litigant's failure to satisfy that procedural rule. In this circuit, at least for the time being, *Prihoda* and other cases give a negative answer. Thus we cannot accept the broad reading of *Dictado*. And it follows that we do not treat *Rice* as adopting that broad reading either, for if *Rice* had done so it would have needed to overrule *Fernandez* and *Jefferson*, which it did not.

There is another possible reading of *Rice*: as a proposal to replace (for purposes of §2244) the rule announced in *Harris*, *Coleman*, and *Ylst* that the ruling of the *last* state court is dispositive (for purposes of locating an independent and adequate state ground) with a rule that the decision of the *first* state court determines whether a state collateral attack was "properly filed." That would not do Brooks any good, however, for in his case the state's court of first instance treated his petition as untimely. We think it best to leave to future litigation, when the matter has been fully briefed, the question whether federal courts should disregard state appellate decisions (as *Rice* seemingly did) when deciding whether a state collateral attack has been "properly filed." One could say in support of such an approach that it avoids mousetrapping the prisoner. If the state's court of first instance accepts a collateral attack and resolves it on the merits, the prisoner sensibly will assume that time has been tolled under §2244(d)(2); by the time the

state's court of appeals reverses, it may be too late to file a federal petition. Yet in many cases (of which Brooks' is a good example) counsel for the state argues from the get-go that the petition is untimely, and this puts the prisoner on notice of the need to file a precautionary federal petition (see *Tinker v. Hanks*, 172 F.3d 990 (7th Cir. 1999); *Freeman*, 208 F.3d at 577) in case the state judiciary, trial or appellate, agrees with that view. Brooks was not misled and knew, from the instant the state court rejected his petition as untimely, that the clock was ticking under §2244(d).

These considerations also knock out Brooks' request for equitable estoppel, beyond the circumstances detailed in §2244(d). The state did not mislead him; to the contrary, it has asserted throughout that the state collateral attack was not properly filed, providing Brooks with information that should have led him to get the federal petition on file earlier. We held in *Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999), that equitable tolling or estoppel is not absolutely negated by the list of tolling circumstances in §2244(d) but added there—and have reiterated since, see *Owens v. Boyd*, 235 F.3d 356 (7th Cir. 2000)—that because the AEDPA has its own list of tolling circumstances, only "some impediment of a variety not covered in §2244(d)(1) [that] prevents the filing of a federal collateral attack" (235 F.3d at 360) could suffice. Otherwise "estoppel" is hard to differentiate from judicial disagreement with the statutory list of circumstances that extend the time. *United States v. Brockamp*, 519 U.S. 347, 351-52 (1997), holds that such lists are presumptively closed-ended. Nothing *prevented* Brooks from filing earlier, and no deceit by the state has been alleged, so he cannot take advantage of any extra-statutory extension of time.

One further argument requires only brief attention. Brooks contends that his appeal within the state system was itself "a properly filed application for State post-con-

viction or other collateral review"; if the time devoted to the appeal is excluded from the calculation, then Brooks' federal petition is timely. This finds support in *Villazana v. Page*, 1999 U.S. Dist. LEXIS 7927 *11-13 (N.D. Ill. May 5, 1999), but the position is unsound. A notice of appeal is not an "application for . . . collateral review." The "application" is the request (here a petition for a writ of habeas corpus), filed in the court of first instance. Some states permit appellate courts to *be* courts of first instance for this purpose, and when an application's first stop is an appellate court, time devoted to its consideration is excluded under §2244(d)(2). But Brooks began in the state's circuit court, not in its appellate court, and his notice of appeal was not a new "application." An appeal marks the continuation of existing litigation, not the initiation of new litigation. This is why, for example, we held in *Fernandez* that time after a trial court's decision, and before the filing of a timely notice of appeal, is excluded by §2244(d)(2): there is just one continuous case.

Treating a notice of appeal as an "application for . . . collateral review" not only would require the time between trial and appellate courts to count against the statutory year (surprising many petitioners who have been anticipating its exclusion) but also would knock out most appeals within the federal system. For a prisoner needs appellate approval to launch a second or successive federal collateral attack. See 28 U.S.C. §2244(b), §2255 ¶8. If a notice of appeal is itself an "application for . . . collateral review" then any prisoner who fails to obtain relief from the district court needs permission under §2244(b) or §2255 ¶8 to appeal (because the appeal would be the second federal collateral attack)—and given the limitations of those sections, which are much more restrictive than the certificate of appealability under §2253(c), that request would be denied almost routinely. Brooks himself could not obtain appellate review of the order dismissing his petition, because he does not

meet the requirements for a second or successive collateral attack. So we hold that an appeal is not a new collateral attack, a decision that is much to the benefit of most prisoners seeking collateral review, even though it means that Brooks' federal application is untimely.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit